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BLUNDELL-LEIGH V. ATTENBOROUGH AND THE LAW OF PLEDGES. — A recent English case [1] involves two highly important questions in the law of pledges: first, what initial delivery to the pledgee or possession by him is necessary to support the creation of a pledge; and, second, what effects follow upon the separation of ownership of the pledge interest in the chattel from the debt which it secures?

Although an agreement that certain chattels of the debtor shall stand as security for a debt creates an equitable lien good against such persons as stand in no better right than the debtor,[2] it is the general rule that to create a pledge valid at law there must be a delivery to and a continuing in possession by the pledgee [3] or some one in his behalf,[4] and

[1] Blundell-Leigh *v.* Attenborough, [1921] 3 K. B. 235. For the facts of this case see RECENT CASES, *infra*, p. 344.

[2] Fletcher American Nat'l Bank *v.* McDermid, 128 N. E. 685 (Ind., 1920); Pierce *v.* Nat'l Bank of Commerce, 268 Fed. 487 (8th Circ., 1920).

[3] See JONES, PLEDGES AND COLLATERAL SECURITIES, 2 ed., §§ 23 *et seq.* As the pledge interest is assignable, possession by an assignee satisfies this requirement of continued possession.

[4] An employee of the pledgor may act as agent for such purpose. Sumner *v.* Hamlet, 12 Pick. (Mass.) 76 (1831). To allow the pledgor himself to act as such agent would practically eliminate the requirement of delivery, yet some authority seems to go to this extent. Macomber *v.* Parker, 14 Pick. (Mass.) 497 (1833). The question is discussed from various aspects in 12 HARV. L. REV. 134; 14 HARV. L. REV. 303; 28 HARV.

that mere agreement without effective change of possession is insufficient.[5] But some things less than actual physical delivery to the pledgee will suffice. Constructive delivery of very bulky articles may be allowed.[6] Or the requirement of delivery may be satisfied by the fact that at the time of the pledge agreement the goods are already in the possession of the pledgee or his agent,[7] or of a third person who then agrees to hold as his agent.[8]

The principal case involves a further relaxation of this requirement. The plaintiff had delivered jewels to A at an earlier date for valuation by him. But at the time of the creation of the debt and pledge agreement, the jewels were in the possession of the defendant, B, who held not in behalf of but in opposition to A, the alleged pledgee, to the extent of advances made A, on the security of these jewels, of a larger sum than A's loan to the plaintiff, the alleged pledgor. As between A and the defendant, — so long as the plaintiff did not intervene,[9] — A was entitled to receive the goods back upon payment of the defendant's loan. But there is no authority that such an attenuated reversionary right to possession is a sufficient substitute for delivery and the court does not hold that it is. The ground of the decision is that the original delivery was intended to be the only one necessary to create the pledge.[10] It is respectfully submitted that the reason is inadequate. It is admitted

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L. REV. 211. It may be suggested that most of the cases in which the pledgor has held as the pledgee's agent without impairment of the latter's rights have been where possession has been returned to the pledgor for a special purpose, there having been an initial delivery to the pledgee. See, for example, Reeves *v.* Capper, 5 Bing. N. C. 136 (1838). See Harding *v.* Eldridge, 186 Mass. 39, 42–43, 71 N. E. 115, 116 (1904); JONES, *op. cit.*, § 44. Or where the existence of an equitable lien or the right to possession was sufficient to justify the result between the parties as to the suit. Martin *v.* Reid, 11 C. B. (N. S.) 730 (1862); Keiser *v.* Topping, 72 Ill. 226 (1874).

[5] Fletcher American Nat'l Bank *v.* McDermid, *supra;* People's Nat'l Bank *v.* Mulholland, 224 Mass. 448, 113 N. E. 365 (1916); Hastings *v.* Lincoln Trust Co., 197 Pac. 627 (Wash., 1921).

[6] Thus a boom of logs was validly pledged by agreement with the pledgor and pledgee going in person and pointing out the logs involved. Jewett *v.* Warren, 12 Mass. 300 (1815).

[7] Van Blarcom *v.* The Broadway Bank, 9 Bosw. (N. Y.) 532 (1862).

[8] Ladd *v.* Myers, 87 Pac. 1110 (Cal. App., 1906); Dearborn *v.* Union Nat'l Bank, 61 Me. 369 (1873). The ability to pledge goods by the transfer of a negotiable document of title rests upon this basis, — the bailee having agreed in advance to hold as agent for such persons as should come within the terms of the receipt, and there is a pledge or not according as the alleged pledgee is brought within those terms — and therefore put into such dominion as to be the equivalent of possession — or not. Whitney *v.* Tibbits, 17 Wis. 359 (1863) (pledge valid); Hastings *v.* Lincoln Trust Co., *supra* (pledge invalid).

[9] Something less than a formal demand upon him by the owner may also require the bailee to protect the rights of the owner against the bailor. See WILLISTON, SALES, § 421.

[10] The lower court held that no pledge was created. Blundell-Leigh *v.* Attenborough, [1921] 1 K. B. 382. The Court of Appeal approved the law of that decision and reversed it solely on the ground that the original delivery to A was intended by him and the plaintiff to be a "good delivery for the purpose of creating a pledge, whenever that pledge was created." Blundell-Leigh *v.* Attenborough, [1921] 3 K. B. 235, 240. This construction of the contract of bailment had been rejected by the lower court. It seems clear, therefore, that it is the character of this delivery and not the fact that the defendant held to some extent in A's behalf which is decisive of this point of the case.

that the agreement to pledge and the delivery need not be contemporaneous,[11] but possession and agreement must at some moment coincide. When the delivery succeeds the agreement it does coincide with it, for it finds the agreement still in force. This is equally true when delivery precedes and the pledgee is in possession at the date of the agreement. Here, however, the agreement arose only after the alleged pledgee's possession — the only possible basis for predicating an extension of the original delivery into future time — had ceased. Again, the wrongful pledge to the defendant was a conversion for which the plaintiff could have recovered the full value of the jewels. But from the result of this case, it follows that this wrong, after it arises, is, without the knowledge or assent of the plaintiff, cut down to a mere wrongful dealing with the pledgor's interest therein.[12] To consider a pledge as created where there is so material a departure from the technical requirements, and where at the outset and by its creation the rights of the parties become so complicated and disputable, is to disregard the necessity for that simplicity and certainty which ought, for the sake of all concerned, to characterize transactions of pledge.[13]

But assuming that a pledge was created and that the pledge interest in the goods passed to the defendant,[14] what were the rights of the parties after the pledge and debt became thus separated and after the further separation by A's delivery of the plaintiff's note to C to secure advances by the latter? A transfer of the debt and security together would plainly have been unimpeachable.[15] And the pledgee can effectively, though tortiously,[16] assign the pledge interest by delivery

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[11] A striking illustration of this is Atherton *v.* Beaman, 264 Fed. 878 (1st Circ., 1920). A pledge was attempted by the delivery of a warehouse receipt in due form, the warehouseman agreeing to hold fifty cars of the pledgor's lumber under this receipt for the pledgee. A larger amount than this was constantly on hand, and no specific fifty cars were appropriated to the receipt until two years later. Such later appropriation was held to validate the pledge, no rights of third parties having intervened. Only the intervention of specific liens of third parties could have altered the result. Parshall *v.* Eggert, 54 N. Y. 18 (1873).

[12] This proposition would seem to be correct if the English doctrine is accepted that such a dealing with the pledge as does not result in a forfeiture of the pledge interest is a tort less than a conversion, actionable in case. There might be more question under the view that there is a conversion, but that the amount of the debt may be used as a set-off. See note 16, *infra*. Which theory is correct would be crucially tested in an action against the pledgee for conversion after he has sold the pledge to one and then the debt in the form of a negotiable instrument to another *bona fide* purchaser. The defendant there would not be able to use the debt to set off. The answer may be that such conduct ought to work a forfeiture of the pledge interest. See note 16, *infra*.

[13] It may be said for the decision that the same result is reached as would be the case if the wrongful repledge had occurred after the pledge had been validly created and that the time order is immaterial. It is believed that the difficulties mentioned in the text and preceding note indicate that the problem is not so easily settled. In the latter case there is no cutting down of a full-fledged tort. Further, this is not a result to be encouraged.

[14] The court holds that the pledge interest enures to the benefit of the defendant by estoppel. This interesting question will be discussed in a subsequent number of the REVIEW.

[15] Waddle *v.* Owen, 43 Neb. 489, 61 N. W. 731 (1895).

[16] Johnson *v.* Stear, 15 C. B. (N. S.) 330 (1863); Halliday *v.* Holgate, L. R. 3 Ex. 299 (1868). Reading these two cases together it appears to be the English law that

without assigning the debt at law.[17] By the strange holding as to the creation of the pledge, the principal case stood in this situation from the very outset. The pledgee had the note, to which, however, the defendant, having advanced a larger sum upon the security of the jewels, was equitably entitled.[18] The defendant had the jewels and, his loan to the pledgee remaining unpaid, he was entitled to retain them "until the extinguishment of the original obligation."[19] The pledgor could not, after notice of the defendant's interest, destroy that interest by payment to the pledgee, A.[20] Hence a tender to the defendant of the amount due from the plaintiff was a prerequisite to a successful claim that the defendant's retention after demand was a conversion,[21] or to a successful suit to regain possession from him.[22] On this point, there-

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the pledgee would be held liable in case for the value of the pledgor's interest, but not in trover for the value of bailed chattel. *Accord*, Post *v.* Union Nat'l Bank, 159 Ill. 421, 42 N. E. 976 (1896). See 10 HARV. L. REV. 65. Some American authority reaches a similar result by allowing a suit in trover in which the amount of the debt may be set off by the defendant. Feige *v.* Burt, 118 Mich. 243, 77 N. W. 928 (1898); Neiler *v.* Kelley, 69 Pa. St. 403 (1871). Conversely the conversion is allowed to be set up by the defendant in a suit upon the debt. Waring *v.* Gaskill, 95 Ga. 731, 22 S. E. 659 (1895); Richardson *v.* Ashby, 132 Mo. 238, 33 S. W. 806 (1896). Where forms of action are abolished, the same measure of damages is retained and the question of form of suit is eliminated. Revert *v.* Hesse, 193 Pac. 943 (Cal., 1920); Aulwes *v.* Farmer's Bank, 182 N. W. 528 (S. Dak., 1921). These cases involve no question of tender as the wrongful repledge or sale is itself the cause of action. See Neiler *v.* Kelley, *supra;* Aulwes *v.* Farmer's Bank, *supra*. They are therefore distinctly not in conflict with such cases as Donald *v.* Suckling, L. R. 1 Q. B. 585 (1866). There is no logical inconsistency in holding the repledge a wrong remediable in some form of action and at the same time holding that the pledge interest is not forfeited. But see 9 HARV. L. REV. 289; *id.*, 540; 27 HARV. L. REV. 393.

[17] It is suggested that some dealings with the pledged chattel may be so inconsistent with the terms of the pledge as to work a forfeiture of it. Blackburn, J., in Donald *v.* Suckling, L. R. 1 Q. B. 585, 614–615 (1866). It might be said that where the debt is in the form of a negotiable instrument, the separation of it from the pledge is such an inconsistent dealing. But see Talty *v.* Freedman's Savings & Trust Co., 93 U. S. 321 (1876). In this case the fact that at one time the note and pledge were separated is not even adverted to in the opinion.

[18] Whitney *v.* Peay, 24 Ark. 22 (1862); Kernohan *v.* Manss, 53 Ohio St. 118, 41 N. E. 258 (1895). *Cf.* Gottlieb *v.* City of New York, 128 App. Div. 148, 112 N. Y. Supp. 545 (1908). See 22 HARV. L. REV. 308. This result may be considered as reached by way of specific reparation for the tort upon the defendant by A in representing to him that he owned the jewels and thereby inducing the loan, or as reached on the ground that, having purported to transfer more than he had, A could not be heard in equity to say that he did not transfer that which alone could make the assigned pledge interest in the jewels more than a bare legal right, namely, the debt. Both lines of thought probably rest upon the same fundamental conceptions.

[19] Williams *v.* Ashe, 111 Cal. 180, 186, 43 Pac. 595, 597 (1896). See also cases in notes 21, 22, *infra*.

[20] There are *dicta* that at law the pledgor, to entitle himself to possession of the pledge as against any assignee thereof, need only pay the legal holder the debt. See Ratcliff *v.* Davis, Yelv. 178; JONES, PLEDGES AND COLLATERAL SECURITIES, 2 ed., § 418. If this includes the case where the pledgor has notice of the assignee's interest before such payment, it seems out of line with the spirit of the modern authorities and ought to be disregarded in a court administering both law and equity, or even in a court of law as a short cut to an equitable result. *Cf.* Thurston *v.* Blanchard, 22 Pick. (Mass.) 18 (1839).

[21] Lewis *v.* Mott, 36 N. Y. 395 (1867).

[22] Donald *v.* Suckling, L. R. 1 Q. B. 585 (1866); Talty *v.* Freedman's Savings & Trust Co., 93 U. S. 321 (1876); Williams *v.* Ashe, 111 Cal. 180, 43 Pac. 595 (1896); Bradley *v.* Parks, 83 Ill. 169 (1876).

fore, the principal case seems sound unless the delivery of the note to C makes some substantial difference. If C became a holder in due course, then, to the extent of his interest, the equitable right of the defendant to the note would be cut off, and the defendant's right to the security would in equity pass equally as an incident of the debt.[23] But if C was not such a holder, then the prior rights of the defendant would subsist unimpaired.

It does not appear which alternative meets the facts of the principal case. But either would justify its result, as the part payment of the note to C exceeded the amount for which he held the note as security, leaving the defendant with a right to the balance due thereon. This right he was entitled to protect by retaining the jewels until tender of at least that sum.

INTERSTATE COMPACTS AS A MEANS OF SETTLING DISPUTES BETWEEN STATES. — Three methods have been used in the United States to avoid or determine controversies, potential or existing, between states: (1) Direct legislation by Congress. (2) A suit by one state, either in its political capacity or as *parens patriæ*,[1] against the other state, in the United States Supreme Court. (3) A compact between states approved, when necessary, by Congress.

The first of the methods is narrow in scope, because Congress may interfere between states only when its constitutional powers permit it to do so.[2] Congress has full power over the territories, however, and by fixing their boundaries [3] and jurisdictional limits before they became states,[4] has doubtless anticipated much interstate dissension.

The second method is more inclusive. Whatever doubt there may be as to what constitutes an interstate cause of action, it is undisputed that the Constitution [5] gave states a remedy for recognized legal wrongs.[6]

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[23] Kernohan *v.* Manss, *supra*, note 18.

[1] Missouri *v.* Illinois and Sanitary District, 180 U. S. 208 (1901); Kansas *v.* Colorado, 185 U. S. 125 (1902); New York *v.* New Jersey and Sewerage Commissioners, U. S. Sup. Ct., Oct. Term, 1920, No. 2, Original. *Cf.* Georgia *v.* Tennessee Copper Co., 206 U. S. 230 (1907).

[2] Legislation as to navigable interstate waters is the instance most in point. See Escanaba Co. *v.* Chicago, 107 U. S. 678, 682 (1882); United States *v.* Rio Grande Irrigation Co., 174 U. S. 690, 708 (1899).

[3] See, as instances, 33 STAT. AT L. 714 (consent to Arkansas to extend her western boundary at the expense of a territory); 26 STAT. AT L. 971, 36 STAT. AT L. 1454 (confirming and reaffirming the boundary line between the state of Texas and the territory of New Mexico). See George C. Lay, "Interstate Controversies," 54 AM. L. REV. 705, 710.

[4] Boundaries and jurisdictional limits are laid down in the enabling acts. It is common in such acts to give states concurrent jurisdiction over boundary waters. State *v.* Moyers, 155 Iowa 678, 136 N. W. 896 (1912); State *v.* George, 60 Minn. 503, 63 N. W. 100 (1895); Roberts *v.* Fullerton, 117 Wis. 222, 93 N. W. 1111 (1903).

[5] Art. III, § 2, cl. 1.

[6] In colonial days, disputes between the colonies were settled by the Privy Council. See Penn *v.* Lord Baltimore, 1 Ves. 443 (1750). See 2 STORY, COMMENTARIES ON THE CONSTITUTION, 5 ed., §§ 1679, 1681. Under the Articles of Confederation, Art. IX, there was a provision for the appointment of commissions, with an appeal to Congress,